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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LENIN ROMERO,

Defendant and Appellant.

F075038

(Super. Ct. No. DF012281A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Colette M. Humphrey and Kenneth C. Twisselman II, Judges.†

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Angelo S. Edralin, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Poochigian, Acting P.J., Detjen, J. and Snauffer, J.

† Judge Humphrey presided over the hearing on the discovery motion; Judge Twisselman presided over all other hearings pertinent to this appeal.

Jose Lenin Romero (defendant) was charged with battery by a prisoner upon a nonconfined person, in the commission of which he personally inflicted great bodily injury (Pen. Code,¹ §§ 4501.5, 12022.7, subd. (a); count 1), and obstructing or resisting, by use of force or violence, an executive officer in the performance of his or her duty (former § 69, now § 69, subd. (a); count 2). As to count 1, it was further alleged defendant previously was convicted of two serious felonies. (§ 667, subd. (a).) As to both counts, it was alleged defendant previously was convicted of two strikes. (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e).)

The current charges arose out of an altercation between defendant, then an inmate at Kern Valley State Prison, and Correctional Officers Garza and Cruz. Defendant asserted at trial that Garza (the victim alleged in count 1) was the initial aggressor and that, at the urging of Cruz (the victim alleged in count 2), Garza beat defendant after defendant had been subdued by Cruz and other officers who responded to the incident. The jury convicted defendant of violating section 69 as charged in count 2, but was unable to reach a verdict on count 1.² Following a bifurcated court trial, defendant was found to have suffered two prior strike convictions. He was sentenced to 25 years to life in prison, to be served consecutively to the terms he was already serving in two other cases.

Prior to trial, defendant sought discovery of Garza's and Cruz's personnel records pursuant to Evidence Code section 1043 and *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). The trial court granted the motion as to Garza, but denied the motion as to Cruz.

Defendant now challenges the court's finding there was no good cause shown to examine Cruz's records in camera. In addition, he asks us to conduct an independent

¹ All statutory references are to the Penal Code unless otherwise stated.

² Count 1 ultimately was dismissed on motion of the district attorney.

review of the sealed *Pitchess* material and transcripts with respect to Garza's records, to determine whether the trial court's in camera hearing complied with applicable law and whether all relevant documents were disclosed to the defense. Although we find no error with respect to Garza, we conclude the trial court should have examined Cruz's records. Accordingly, we will conditionally reverse the judgment and remand the matter for further proceedings.

THE PITCHESS MOTION³

Defendant moved for discovery of information contained in the personnel records of Cruz and Garza, or, alternatively, an in camera review of those records. Specifically, he sought (1) the names, addresses, telephone numbers, and/or California Department of Corrections and Rehabilitation (CDCR) numbers of people who had, within the preceding five years, filed complaints or "602s"⁴ with CDCR regarding those officers, for acts indicating or constituting dishonesty, false arrest, the fabrication of charges and/or reports and/or evidence, excessive or unreasonable force, or improper tactics that may have been used under color of authority; (2) the dates such complaints were filed; and (3) whether any disciplinary action was taken against the officer(s) as a result and the nature of any such discipline.

In support of the motion, defense counsel summarized and appended copies of the officers' reports concerning the incident that led to the charges against defendant. According to counsel's declaration, the reports stated defendant was agitated when he exited his cell to obtain his medication. Defendant told Garza, who was monitoring the dispensing of pills, that he wanted the power turned back on in his cell. Garza responded that a work order had been placed for the repair. Defendant returned to his cell, still

³ In light of the narrow issues before us on appeal, we dispense with a summary of the evidence adduced at trial.

⁴ A CDCR form 602 is a document used in the inmate grievance process. (See Cal. Code Regs., tit. 15, § 3084.2.)

agitated, whereupon Garza heard unusual noises and found defendant pacing in his cell with his hands balled into fists and a pen in his right hand. A discussion ensued, then defendant lunged at Garza and struck Garza in the face with his left hand. When Garza yelled at defendant to get down and tried to push defendant, defendant grabbed Garza around the neck and pulled him into the cell, whereupon he struck him several more times. Garza struck defendant in the torso. Cruz entered the cell and helped Garza force defendant to the ground. The officers were able to pin defendant down, at which time responding staff arrived. According to Cruz's report, defendant subsequently said, " 'That's 3 cops I've taken care of. I got you, Garza. You punk! My next one will be a murder!' "

Counsel also stated, on information and belief, the defense version of events. Under this version, when defendant received his medication, he told Garza there had been no electricity in his cell for a week. Garza responded that defendant had previously asked him, and he told defendant not to ask about the electricity again, because he (Garza) was going to do what he wanted to do. Defendant told Garza that Garza was in the wrong, and that defendant was not the type of person who was going to stay quiet. Defendant returned to his cell, and the cell door was shut. Defendant told his cellmate that he was going to board up the windows near the cell door, so the sergeant would come and defendant could speak to him about the electricity problem. Defendant started to tape paper on the windows, at which point Garza and Cruz arrived at the cell door. Defendant explained what he was doing and why. Garza told him to remove some of the paper so Garza could see defendant. Defendant did; the two talked for a moment and then started to argue. Garza had the control booth officer open the door to defendant's cell. The argument continued, then Garza struck defendant in the head. When defendant struck Garza in response, the alarm was triggered to summon more officers for assistance, Cruz struck defendant with a baton, and then he and other officers immobilized and handcuffed

defendant. Cruz then told Garza, “ ‘Get your money, boy,’ ” whereupon Garza beat defendant until Garza was tired.

Counsel stated, again on information and belief, that complaints had been filed with CDCR alleging acts indicating, or instances of, dishonesty and the use of excessive/unreasonable force by the officers. She asserted that discovery of such records would be used to locate witnesses to testify that “the officer” had character traits, habits, and customs to engage in the specified misconduct; that such testimony would help establish the officer engaged in such dishonesty and excessive/unreasonable force in this case; and the discovery would also be used to cross-examine and impeach the officer.

CDCR opposed the motion on the grounds defendant failed to provide an alternate version of events that was plausible; thus, he failed to establish good cause for disclosure.

The trial court granted the request for an in camera hearing with respect to Garza’s personnel records, but found no good cause for such a hearing with respect to Cruz’s records. At the conclusion of the in camera hearing, the court ordered disclosure of one complaint against Garza, but found nothing else that was discoverable. It ordered the transcript of the in camera proceedings sealed.

DISCUSSION

A criminal defendant has a limited right to discovery of peace officer and custodial officer personnel records and records of citizen complaints against such personnel that are maintained pursuant to section 832.5; such records are confidential and can only be discovered pursuant to Evidence Code sections 1043 and 1045. (*Giovanni B. v. Superior Court* (2007) 152 Cal.App.4th 312, 318; see § 832.7, subd. (a).)⁵ A defendant is entitled to discovery of relevant information from the confidential records

⁵ Effective January 1, 2019, section 832.7 was amended so as to make certain peace officer and custodial officer personnel records available for public inspection. (Stats. 2018, ch. 988, § 2.) There is no indication any of the personnel records at issue in this case fall within the new provisions.

upon a showing of good cause, which exists “when the defendant shows both ‘ “materiality” to the subject matter of the pending litigation and a “reasonable belief” that the agency has the type of information sought.’ [Citation.]” (*People v. Gaines* (2009) 46 Cal.4th 172, 179.)

While cases have formulated the materiality requirement in various ways — often requiring a specific factual scenario that establishes a plausible factual foundation (see, e.g., *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1020-1023) — the California Supreme Court has made clear that, no matter how the materiality inquiry is described, “a showing of good cause requires a defendant seeking *Pitchess* discovery to establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer’s version of events.” (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1021.) “[A] plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges.” (*Id.* at p. 1026.)

In light of the foregoing, “a defendant meets the materiality element by showing (1) a logical connection between the charges and the proposed defense; (2) the requested discovery is factually specific and tailored to support the claim of officer misconduct; (3) the requested discovery supports the proposed defense or is likely to lead to information that will do so; and (4) the requested discovery is potentially admissible at trial. [Citation.]” (*Giovanni B. v. Superior Court, supra*, 152 Cal.App.4th at p. 319.)

“A showing of good cause is measured by ‘relatively relaxed standards’ that serve to ‘insure the production’ for trial court review of ‘all potentially relevant documents.’ [Citation.]” (*People v. Gaines, supra*, 46 Cal.4th at p. 179; see *People v. Samuels* (2005) 36 Cal.4th 96, 109 [good cause requirement embodies “ ‘relatively low threshold’ for discovery”].) A declaration by counsel on information and belief is sufficient to state

facts satisfying the materiality requirement (*Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086; see *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85-86); moreover, depending on the circumstances of the case, a sufficient factual allegation may consist of a denial of the facts asserted in the police report (*Uybungco v. Superior Court* (2008) 163 Cal.App.4th 1043, 1049; see *Warrick v. Superior Court*, *supra*, 35 Cal.4th at p. 1023).

If the defendant establishes good cause, the custodian of records should bring to court all documents that are potentially relevant to the defendant's motion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.) The trial court must then review the records in camera to determine what information, if any, should be disclosed. Subject to the exceptions and limitations contained in Evidence Code section 1045, subdivisions (b) through (e), the court must disclose to the defendant such information as is relevant to the subject matter involved in the litigation.⁶ (*People v. Gaines*, *supra*, 46 Cal.4th at p. 179.) A trial court is afforded wide discretion in ruling on a motion for access to law enforcement personnel records, and we will reverse only on a showing of abuse of that discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330; *People v. Samayoa* (1997) 15 Cal.4th 795, 827; *Haggerty v. Superior Court*, *supra*, 117 Cal.App.4th at p. 1086; see *Pitchess*, *supra*, 11 Cal.3d at p. 535.)

The record of the trial court's in camera review of Garza's records is adequate for our review, and demonstrates the court followed the appropriate procedure. (See *People v. Mooc*, *supra*, 26 Cal.4th at pp. 1228-1229; *People v. Yearwood* (2013) 213

⁶ For our purposes, the pertinent limitations are contained in subdivision (b) of Evidence Code section 1045, which excludes from disclosure "(1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought. [¶] (2) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code. [¶] (3) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit."

Cal.App.4th 161, 180.) Moreover, we have independently reviewed Garza’s sealed files, which have been made part of the record on appeal but which have not been disclosed to counsel for either party. Our review “reveals no materials so clearly pertinent to the issues raised by the *Pitchess* discovery motion that failure to disclose them was an abuse of *Pitchess* discretion. Accordingly, we conclude the trial court properly exercised its discretion” with respect to what it ordered disclosed to the defense. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 827; see *People v. Hughes*, *supra*, 27 Cal.4th at p. 330.)

We further conclude, however, that the trial court erred by finding defendant failed to meet the “ ‘relatively low threshold’ ” (*People v. Samuels*, *supra*, 36 Cal.4th at p. 109) required to establish good cause to examine Cruz’s personnel records in camera. Defense counsel’s declaration, although stated upon information and belief, adequately demonstrated a defense theory of self-defense against battery as well as use by the alleged victims of excessive force.⁷ Although, under the defense version of events, Cruz was not involved initially in the affray between Garza and defendant, Cruz joined in and additionally urged Garza to beat defendant after defendant had been subdued. Defendant’s version directly contradicted the version contained in Cruz’s report. Cruz’s credibility and habit or custom, if any, of using or assisting in the use of unlawful force were relevant to both counts. (See *People v. Johnson* (2004) 118 Cal.App.4th 292, 303; *People v. Gill* (1997) 60 Cal.App.4th 743, 749-750.) Defendant adequately demonstrated

⁷ As previously described, defendant was charged in count 1 with violating section 4501.5, battery by a prisoner on a nonconfined person. “Self-defense allows the use of reasonable force to resist the unlawful application of force or unlawful touching” (*People v. Clark* (2011) 201 Cal.App.4th 235, 250), i.e., a battery (see § 242; see also *People v. Mayes* (1968) 262 Cal.App.2d 195, 198). Defendant was charged in count 2 with violating section 69, obstructing or resisting an executive officer in performance of his or her duty. The crime of resisting an officer by force and violence “requires that the officer be engaged in the lawful performance of his duties.” (*People v. Rodriguez* (2012) 207 Cal.App.4th 1540, 1543; see *In re Manuel G.* (1997) 16 Cal.4th 805, 814-816.) When an officer uses excessive force, he or she is not engaged in the lawful performance of his or her duties. (*People v. Williams* (2018) 26 Cal.App.5th 71, 73.)

the materiality of the requested information with respect to Cruz, and a reasonable belief the agency had the type of information sought. (See *City of Santa Cruz v. Municipal Court, supra*, 49 Cal.3d at pp. 85-86; *People v. Hustead* (1999) 74 Cal.App.4th 410, 417-418.)

“[T]he proper remedy when a trial court has erroneously rejected a showing of good cause for *Pitchess* discovery and has not reviewed the requested records in camera is . . . a conditional reversal with directions to review the requested documents in chambers on remand. [Citation.]” (*People v. Gaines, supra*, 46 Cal.4th at p. 180.) If the in camera review uncovers no relevant information, the judgment should be reinstated. (*Id.* at p. 176.) If, however, relevant information exists that should have been disclosed, the trial court must order disclosure, allow defendant an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed. (*Id.* at p. 181.)

DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the trial court with directions to hold a new in camera hearing on defendant’s *Pitchess* motion with respect to Officer Cruz’s personnel records. If the trial court finds there are discoverable records, they shall be disclosed, and the court shall conduct such further proceedings as are necessary and appropriate, in conformance with this opinion. If the court finds there are no discoverable records, or that there is discoverable information but defendant cannot establish that he was prejudiced by the denial of discovery, the judgment shall be reinstated as of that date.